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No. 99-786

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION, HJB, INC., *et al.*,
Petitioners,

v.

AMERISOURCE CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly granted a directed verdict on the petitioning retail pharmacies' claim that respondents, brand name prescription drug ("BNPD") manufacturers and wholesalers, entered into an agreement to deny them discounted prices for BNPDs, where petitioners failed to present direct evidence of such an agreement and further failed to present indirect, economic evidence " 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

2. Whether the court of appeals correctly held that the trial court had not abused its discretion in striking or, alternatively, giving no weight to expert testimony that retail pharmacies have the power to exclude BNPDs from their inventories and can use that power to force BNPD manufacturers to grant them discounted BNPD prices, where the testimony both rested on a demonstrated "lack of knowledge," Pet. App. 11a, and was "inconsistent with [the evidence]," *id.* at 35a, and thus was wholly unreliable under *Kumho Tire Co.* v. *Carmichael*, 119 S. Ct. 1167 (1999).

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are listed in the Petition for a Writ of Certiorari. See Pet. ii-iv. There are no additional parent companies or nonwholly owned subsidiaries of the parties. See Sup. Ct. R. 29.6.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION	12
I. THE COURT OF APPEALS' DECISION IS ENTIRELY CONSISTENT WITH *UNITED STATES* v. *SOCONY-VACUUM*	13
II. THE COURT OF APPEALS CORRECTLY APPLIED THE TEST ESTABLISHED IN *DAUBERT* v. *MERRELL DOW PHARMACEUTICALS, INC.*	17
III. THE RETAIL PHARMACIES FAILED TO PRESENT SUFFICIENT EVIDENCE OF COLLUSION TO AVOID A DIRECTED VERDICT	21
A. There Was No Direct Evidence Of A Conspiracy To Deny Discounted Prices On BNPDs	21
B. Petitioners Failed To Present Evidence That Tends To Exclude The Possibility That The Drug Manufacturers Acted Independently	24
IV. THE DIRECTED VERDICT IN THIS CASE IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *CONTINENTAL ORE CO.* v. *UNION CARBIDE & CARBON CORP.*	27
CONCLUSION	30

TABLE OF AUTHORITIES

Cases	Page
Abbott Lab. v. *Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976)	4, 14
In re Baby Food Antitrust Litig., 166 F.3d 112 (3d Cir. 1999)	24
Blue Dane Simmental Corp. v. *American Simmental Ass'n*, 178 F.3d 1035 (8th Cir. 1999)	21
Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)	27, 28
Daubert v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)	1, 17, 18
Eastern R.R. Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)	23
General Elec. Co. v. *Joiner*, 522 U.S. 136 (1997)	21
Irvine v. *Murad Skin Research Lab., Inc.*, 194 F.3d 313 (1st Cir.), *cert. dismissed*, 120 S. Ct. 577 (1999)	20
Kumho Tire Co. v. *Carmichael*, 119 S. Ct. 1167 (1999)	*passim*
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986)	*passim*
Moore v. *Boating Indus. Ass'ns*, 819 F.2d 693 (7th Cir. 1987)	22
United Mine Workers v. *Pennington*, 381 U.S. 657 (1965)	23
United States v. *General Motors Corp.*, 384 U.S. 127 (1966)	16
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)	2, 13
VMI v. *United States*, 508 U.S. 946 (1993)	1
Weit v. *Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981)	23
Federal Statutes	
15 U.S.C. § 13	8
21 U.S.C. § 353(c)(3)(A)	14
State Statute	
225 Ill. Comp. Stat. 85/25 (West 1998)	3

INTRODUCTION

In this antitrust case involving brand-name prescription drugs ("BNPDs"), the court of appeals applied well-established legal rules governing entry of a directed verdict on a claim for violation of section 1 of the Sherman Act, see *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and the admissibility of expert testimony, see *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co.* v. *Carmichael*, 119 S. Ct. 1167 (1999). The court upheld the district court's entry of a directed verdict on the petitioning retail pharmacies' claim that respondents, BNPD manufacturers and wholesalers, had entered into an agreement to deny pharmacies discounts off the list prices of BNPDs. But, the court also reversed the district court's exclusion of evidence and grant of judgment on petitioners' claim that the *manufacturers* conspired to peg BNPD price increases to the Consumer Price Index ("CPI"), and remanded that issue to the trial court.

There is no dispute about the legal rules relevant to this case, nor any conflict among the courts of appeals about the substance of those rules or any general issue of their application in this case. Petitioners thus ask this Court to review the application of its settled rules to a particular evidentiary record, a task which is inherently unworthy of certiorari. That is particularly so where, as here, the petition is interlocutory. See *VMI* v. *United States*, 508 U.S. 946 (1993). Review is also unwarranted because the court of appeals faithfully followed this Court's decisions and manifestly reached the correct conclusion.

At the core of each of the four issues petitioners propose for review is their disagreement with the court of appeals' conclusion that petitioners failed to present direct evidence of an agreement to deny discounted prices to retail pharmacies and further failed to present indirect, economic evidence " 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Mat-*

sushita, 475 U.S. at 588 (quoting *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

First, petitioners assert that the court of appeals' decision is inconsistent with this Court's decision in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), which held that horizontal agreements to fix prices are illegal per se. Petitioners' argument is based in its entirety on the false premise that they presented evidence of an *agreement* to deny discounted prices to retail pharmacies and that the court of appeals erroneously considered this "fact" irrelevant. In fact, the appeals court held that petitioners failed to present evidence of such an agreement.

Second, petitioners claim that the court of appeals misapplied *Daubert* and *Kumho Tire Co.* when it affirmed the trial court's discretionary decision to strike expert testimony that retail pharmacies have the power to exclude BNPDs from their inventories and can use that power to force manufacturers to grant them discounts. As the court of appeals explained, this testimony was properly excluded, or alternatively entitled to no weight, because it rested on a demonstrated "lack of knowledge," Pet. App. 11a, and thus was unreliable "regarding the particular matter to which the expert testimony was directly relevant." *Kumho Tire Co.*, 119 S. Ct. at 1177.

Third, petitioners claim that their direct and indirect evidence was sufficient to avoid a directed verdict on the question of agreement. In making this argument, they mischaracterize evidence, rely heavily on a document not admitted into evidence, and point to record citations that do not support their assertions. The court of appeals correctly affirmed the directed verdict because the record demonstrated that respondents' pricing decisions were not the product of agreement, but rather of each BNPD manufacturer's self-interested business judgment.

Finally, petitioners argue that their failure to present evidence of agreement to deny discounts to retail pharma-

cies should not be fatal to their claim because the court of appeals concluded that they did present evidence of a different agreement to injure a different class of victims—to wit, a manufacturer conspiracy to peg price increases for all customers to the CPI. But, as this Court explained in *Matsushita*, no inference of conspiracy to engage in one type of allegedly anticompetitive conduct arises from evidence of a conspiracy to engage in a *different* type of anticompetitive conduct unless there is some logical link between the conspiracies. 475 U.S. at 595-96. Petitioners failed to present any evidence of such a link.

The court of appeals' fact-bound holdings were all correct and, in any event, do not merit this Court's review.

STATEMENT OF THE CASE

1.(a) *Brand-Name Prescription Drugs.* This case involves brand-name, prescription drugs ("BNPDs"). A consumer cannot buy, and a retail druggist cannot sell, these products without a doctor's prescription. For purposes of this case, the term BNPD includes single-source, co-branded, and multisource prescription drugs. See Pet. App. 39a. Single-source drugs are patented drugs sold by a single manufacturer under a brand name. Co-branded drugs are identical, patented drugs licensed for sale by more than one manufacturer under different brand names. Transcript ("T") 805. Multisource drugs are formerly patented drugs that are currently subject to competition from bio-equivalent, generic drugs (that is, drugs containing the same active ingredients). When a doctor writes a prescription for a multisource drug, the pharmacist may lawfully substitute (or be required by state law to substitute) a generic equivalent unless the doctor has specified "may not substitute" on the prescription. T810. A pharmacist may never lawfully dispense a chemically different drug without the doctor's consent. T792-93; see, *e.g.*, 225 Ill. Comp. Stat. 85/25 (West 1998).

(b) *Discounts for Hospitals, Nursing Homes, and Managed Care Organizations.* Hospitals, nursing homes, and

managed care organizations, such as HMOs, preferred provider organizations, and health plans, are able to offer and restrict access to patients being treated in their facilities or by physicians under their control. These entities use their bargaining power to obtain discounted contract pricing from many kinds of health care providers, including BNPD manufacturers. The evidence in this case demonstrated that "[t]he power to exclude is a potent economic weapon." Pet. App. 29a. "[N]ot only have drug manufacturers been confronted and affected by it, not only have retail pharmacies been required to yield to it and accommodate it as best they can, but doctors and hospitals have succumbed to its force in the form of discounted prices to [patients in managed care organizations]." *Id.* See also *id.* at 21a-22a, 23a, 25a, 26a-27a. Hospitals, nursing homes, and managed care organizations "clearly, unequivocally and irrefutably" have the power to control access to their patients, and thus to extract discounts from providers, including BNPD manufacturers and retail druggists. *Id.* at 29a.

At least since the 1970s, hospitals and managed care organizations have used their power to exclude to obtain discounted prices for BNPDs. See *Abbott Lab.* v. *Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976). Specifically, these organizations have established "formularies"—lists of approved drugs—to indicate to doctors which drugs should be prescribed. If the organization determines that certain drugs are therapeutically equivalent to one another, it may list only the cheapest in its formulary. Inclusion or a preferred position in a formulary increases the drug's use and exclusion or a non-preferred position reduces or eliminates its use. See Pet. App. 9a, 11a, 21a-22a, 23a-24a, 27a. See also T1039, 2950-53, 1042-44.

(c) *Retail Pharmacies.* In sharp contrast, retail pharmacies and their buying groups lack the power to exclude BNPDs from their inventories. They generally must stock

virtually all BNPDs to serve their customers. Retailers have not threatened to cease purchasing a BNPD unless they receive a lower price and do not have formularies or other mechanisms to control a doctor's prescription decisions. See Pet. App. 21a-30a. See also T1066-67, 1990-91, 877-78, 905-06, 5381, 1938-39, 1991, 3003-04, 1068, 5411.

(d) *The Pricing of BNPDs.* Because hospitals and managed care organizations have the power to exclude BNPDs, their demand for such drugs is relatively elastic—that is, they decrease or eliminate their purchases of a BNPD as it gets more expensive. Retail pharmacies, by contrast, lack the power to exclude and so have a relatively inelastic demand for BNPDs. Manufacturers are thus able to charge retail pharmacies higher prices for many BNPDs than are paid by purchasers with the leverage to obtain a discount. See Pet. App. 21a-30a.

There are significant variations, however, concerning the pricing of individual drugs. For example, with respect to many single-source drugs, a hospital or HMO can meaningfully influence its doctors' prescribing decisions, but the retail pharmacist cannot dispense anything other than the drug prescribed. T792-93. Thus, manufacturers rarely offer discounts to retail pharmacies on single-source drugs. With respect to some *multisource* BNPDs, however, manufacturers have sometimes offered discounts because pharmacists lawfully may be able to influence the choice between the BNPD and the generic equivalent. See Pet. App. 37a, 28a.[1] Usually, however, brand loyalty is sufficiently high that BNPD manufacturers maximize their profits by declining to "chase" generic prices, opting instead to maintain a lower sales volume to brand-loyal

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[1] There was substantial record evidence addressing this point. *See also* T730, 1853, 3554-55, 3684, 4478-79, 4507-08, 4150-53, 5816-19, 4359-66, 4381, 3710, 3778, 3982-83, 2358-59, 3840, 3855, 3883, 934-35, 1826, 1869-71 2826, 2892, 3043-46, 3391-92, 3395-96, 3446-47, 3683-84; MA1-5, 133-34.

customers. See, *e.g.*, T1823-25, 3840, 3855, 5817. As a result, BNPDs are often sold to retail pharmacies at higher prices than their generic equivalents. See generally Pet. App. 9a, 20a-30a; T1823-25, 733-34, 810, 838.

(e) *Wholesalers and the Chargeback System.* BNPD manufacturers generally do not sell directly to retail or non-retail pharmacies. Instead, manufacturers usually sell to wholesalers who, in turn, resell to pharmacies that "prefer, other things being equal, to deal with a single supplier who stocks the drugs of the different manufacturers (namely a wholesaler) than with each manufacturer separately." Pet. App. 4a. The wholesaler is compensated for warehousing and distribution services by a service fee that it negotiates with its customers. Manufacturers play no role in setting wholesalers' service fees.

As set forth above, BNPD manufacturers often wish to sell particular drugs to different customers at different prices; for example, a manufacturer may negotiate one discount with a hospital and a different discount with an HMO. In order to enable manufacturers to deliver discounts to customers who buy from wholesalers, drug manufacturers use an accounting mechanism called the chargeback system. Under the chargeback system, a manufacturer sets a uniform BNPD price for wholesalers. The manufacturer contracts directly with customers with leverage for discounted prices. The wholesaler plays no role in the negotiation of these discounted prices or in determining which customers receive discounts. When the wholesaler resells to customers who have negotiated a discount, it reports that sale to the manufacturer who reimburses the wholesaler for the difference between the discounted price and the full list price. Pet. App. 3a-4a.[2] In

[2] The chargeback system is analogous to manufacturer coupons that may be redeemed in a retail store. A customer that has negotiated a discounted price notifies the wholesaler of that price when it makes its purchase just as a retail customer with a coupon

this way, the wholesaler obtains its service fee and nothing more, and customers with leverage receive BNPDs at a discounted price immediately instead of waiting for a post-sale rebate.

Customers, particularly hospitals, were the driving force behind the establishment of the chargeback system. They wanted the convenience of dealing with wholesalers, and they also wanted to receive the discounts they had negotiated with BNPD manufacturers to be reflected immediately in their invoices. See T1140-41, 2193-94, 4192-93, Pl. Ex. 272.

As explained by the court of appeals, the chargeback system also has the effect of preventing arbitrage by wholesalers. If manufacturers were to charge different prices to wholesalers serving their customers, this would allow "a wholesaler [to] buy at the discounted price more than he needed to supply his hospital, HMO, and nursing home customer and sell the surplus to pharmacies at a price below the nondiscounted price that the manufacturer wants them to pay." Pet. App. 2a. The use of chargebacks prevents such wholesaler arbitrage by allowing the manufacturer to charge its uniform list price, subject to a later chargeback if the wholesaler sells to a customer that has negotiated a discount from the manufacturer.

(f) *The Alleged Conspiracy.* Petitioners alleged that BNPD manufacturers and wholesalers entered into an agreement not to provide retail pharmacies with discounts off list prices of BNPDs. It is lawful for a BNPD manufacturer with market power to engage in price discrimination—that is, to charge different customers different

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notifies the retailer of his or her right to a reduced price by presenting the coupon. The wholesaler then charges the customer the reduced price and charges the cost of the discount to the manufacturer just as the retail store sends the coupons it has honored to the manufacturer for cash or credit.

prices—unless respondents *agreed* among themselves to deny discounted prices to retail pharmacies.[3]

Petitioners acknowledged that respondents did not agree to fix the list prices of BNPDs. Pet. App. 39a. Absent such an agreement, the conspiracy is implausible. Petitioners' allegation is that, in this conspiracy, BNPD manufacturers were permitted to compete for retail pharmacies' business by cutting their list prices (or offering post-sale rebates), but were not permitted to compete by offering discounts off list prices at the time of sale.

2.(a) *The District Court.* Commenting in 1993, retail pharmacies filed more than 100 actions first against BNPD manufacturers and later against wholesalers as well, alleging that they had conspired to deny retail pharmacies discounted prices for BNPDs. The cases were transferred to the District Court for the Northern District of Illinois by the Judicial Panel on Multi-district Litigation.

The district court certified a class of retail pharmacies. At the close of discovery, all defendants moved for summary judgment on the Sherman Act claims. The district court granted summary judgment to the wholesalers, but denied the manufacturers' motion with one exception not pertinent here. Pet. App. 50a. The court entered final judgment pursuant to Rule 54(b), permitting an immediate appeal from the order granting summary judgment to the wholesalers, but *not* from the order denying summary judgment to the manufacturers.

(b) *The First Appeal.* Due to the posture of the case, the court of appeals *assumed* that the 23 manufacturer defendants had conspired to fix prices, and the issue was whether there was sufficient evidence to tie the wholesalers to the alleged conspiracy. The Seventh Circuit reversed the district court's order granting summary judg-

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[3] Petitioners did not claim that such price discrimination violated the Robinson-Patman Act, 15 U.S.C. § 13.

ment to the wholesalers, explaining that "[t]he theory is that the wholesalers were the manufacturers' cats-paws. There is nothing new about the idea that a cartel might 'hire' a customer to help police the cartel." Pet. App. 138a. The case returned to the district court to give petitioners an opportunity to prove their theory.

(c) *The Trial and the Directed Verdict.* A ten-week trial began in September 1998. The retail pharmacies called four fact witnesses and two experts and read portions of 85 depositions into the record. Most of their evidence focused on manufacturers not on trial. Petitioners failed to prove the "cats-paw" theory. Thus, after the retail pharmacies rested, all defendants moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). The district court granted the motions on November 30, 1998, and issued its opinion on January 19, 1999. Pet. App. 17a-48a.

The district court explained that, even "viewing the evidence in the light most favorable to the Class Plaintiffs, no reasonable jury could reach a verdict in favor of the Class Plaintiffs." Pet. App. 48a. Specifically, the court concluded that the evidence of any conspiracy was "meager at best" and that the evidence linking any of the five manufacturer defendants to the alleged conspiracy was "paltry." *Id.* at 45a. The court pointed out that, contrary to plaintiffs' allegations, the evidence had disclosed a multitude of discounts of BNPD prices to retail pharmacies. *Id.* at 37a. The court further explained that "when the class of trade known as retail pharmacy was denied discounts, the denials were based on the belief that retail pharmacies lacked the power to exclude the company's products, while others who received discounts were believed to have the power to exclude [BNPDs] through formularies and other prescribing-decision influences." *Id.* at 30a. The plaintiffs' evidence not only failed to prove a conspiracy, but also actually supplied the "independent

rationale for why the Defendants priced the way they did." *Id.* at 27a. The court also concluded that the evidence that some BNPD manufacturers (though generally not the defendant manufacturers) and wholesalers attended certain industry meetings did not support an inference of agreement. *Id.* at 45a-46a. Finally, the court determined that the chargeback system pre-dated the alleged conspiracy, was not " 'inherently anticompetitive,' " and was only an efficient mechanism to provide instantaneous discounts to customers who preferred to buy through wholesalers. *Id.* at 47a (quoting plaintiffs' economic expert).

In granting the directed verdict, the district court excluded the opinion testimony of Dr. Lucas because his "opinions about the pharmaceutical drug industry and the claimed collusion among the Defendants failed every test of admissibility." Pet. App. 38a-39a.

(d) *The Second Appeal.* The court of appeals affirmed the district court's order granting the defendants' motion for a directed verdict. Pet. App. 1a-16a. It held that the retail pharmacies failed to "present[] direct evidence (admissions or eyewitness accounts) that the manufacturers had agreed to collude; or [to present] circumstantial evidence, economic in character, that their behavior could better be explained on the hypothesis of collusion than on the hypothesis that each was embarked on an individual rather than a concerted course of action." *Id.* at 5a.

The court first addressed the alleged direct evidence of conspiracy. It rejected the claim that *non-defendant* BNPD manufacturers' attendance at an April 1985 meeting of wholesalers was evidence of conspiracy. Only one wholesaler defendant was present and only *non-defendant* wholesaler participants expressed a disinclination to grant retail pharmacy groups discounts on wholesalers' service charges. Moreover, "[n]one of the manufacturer defendants was present . . . and there is no evidence that the manufacturers who were represented at the meeting were

acting as agents of the defendants." Pet. App. 6a. Finally, the evidence related to wholesaler service fees, which were not the subject of conspiracy allegations. *Id.*

Next the court explained that the "joint adoption" of the chargeback system, "independent of any design to reduce competition at either the manufacturer or the wholesaler level, would not raise questions" of a per se violation of section 1 of the Sherman Act. Pet. App. 6a. The chargeback system was simply a vehicle by which each manufacturer could deliver discounts it had independently negotiated with a customer through a wholesaler. The system neither reduced competition nor was used as a tool to reduce competition. *Id.* at 4a-5a.

The "only other direct evidence of a manufacturers' conspiracy [was] a scattering of internal company documents indicating anxiety that competitors might decide to grant such discounts." Pet. App. 6a-7a. "All firms worry about price cutting by their competitors; these worries are not evidence of price fixing" and may be "evidence of the contrary, since there is no indication that anyone employed by a manufacturer thought that such price cutting to pharmacies as occurred was in violation of an agreement among the manufacturers." *Id.* at 7a.

The court then turned to the plaintiffs' indirect, economic evidence of collusion. It observed that BNPDs are priced discriminatorily, that discrimination requires market power, and that the chargeback system facilitates discrimination. Pet. App. 7a. But, the court explained, there was no evidence that the manufacturers' market power and the resultant discriminatory pricing were the product of collusion.

> The least elastic demanders are the pharmacies, because they must stock a full range of drugs in order to fill prescriptions. They can therefore expect to be charged the highest prices. In contrast, a hospital, nursing home, or HMO or other managed-care

> enterprise has a more elastic demand because it can influence (for example through a "formulary," a list of approved or recommended drugs) the physician's choice of which brand (or no brand—a generic) to prescribe. A slight increase in the price of one brand to such a purchaser might cause the manufacturer's sales of that brand to plummet. That manufacturers of [BNPDs] grant discounts to the enterprises we have listed but refuse to grant discounts to pharmacies is thus consistent with unilateral profit-maximizing behavior by the manufacturers. [*Id.* at 9a-10a.]

The court of appeals also rejected plaintiffs' reliance on Dr. Lucas's testimony that retail pharmacies' demand for BNPDs was elastic (like that of managed care organizations) "because it rested on a demonstrated lack of knowledge about the competitive significance of formularies" and ignored the evidence that pharmacies lacked the ability to influence doctors' prescribing patterns. Pet. App. 11a.

Finally, the court held that there was sufficient evidence of a separate agreement among manufacturers to "peg future price increases to the [CPI]" to create a triable issue of fact. Pet. App. 12a. The court reversed the district court's judgment that the evidence of this claim was barred by the *Noerr-Pennington* doctrine and remanded the case against the manufacturer defendants for further proceedings on that limited issue. The judgment in favor of the wholesalers was affirmed.

REASONS FOR DENYING THE PETITION

Petitioners seek interlocutory review of a court of appeals' decision that correctly applies well-established legal rules and that is consistent with applicable decisions of this Court and the courts of appeals. There is accordingly no basis for certiorari to be granted.

I. THE COURT OF APPEALS' DECISION IS ENTIRELY CONSISTENT WITH *UNITED STATES* v. *SOCONY-VACUUM.*

Petitioners' first argument—that the court of appeals' decision is inconsistent with *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)—is based on the false premise that petitioners presented evidence that respondents entered into an *agreement* to deny discounted prices to retail pharmacies. Both the district court and the court of appeals properly ruled that petitioners had failed to present such evidence. This point renders *Socony-Vacuum* completely irrelevant.

In *Socony-Vacuum*, this Court held that "a combination formed for the purpose and with the effect of fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." 310 U.S. at 223. There is no dispute that an agreement to fix prices violates section 1 of the Sherman Act. The existence of an agreement, however, is a fundamental element of such a violation, and the undisputed factual premise of *Socony-Vacuum* was that the defendants had entered into such an *agreement*. Here the lower courts correctly held that petitioners failed to present sufficient evidence of agreement to survive a motion for a directed verdict. Thus, the decision to grant a directed verdict on petitioners' section 1 claim is in no way inconsistent with *Socony-Vacuum*.

Petitioners, however, argue that respondents engaged in "collective activities . . . to prevent the lawful resale of discounted drugs." Pet. 11. See also *id.* at 13. There is no evidence in this record that respondents *collectively* agreed to any restrictions on the resale of discounted drugs. Individual BNPD manufacturers agreed with individual customers to discount certain BNPD prices and, in some cases, individual BNPD manufacturers entered into contracts with customers providing that the customers would

not re-sell the BNPD at issue.[4] But petitioners do not—and cannot—cite any evidence that restrictions on the resale of discounted drugs were the product of any agreement.

Petitioners also assert that the "purpose" and the "effect" of the chargeback system was to prevent the resale of discounted drugs to retail pharmacies. Pet. 13. This statement baldly misrepresents the evidence. The chargeback system predated the alleged conspiracy. It played no role in determining which customers would receive a discount, which drugs would be discounted, or how deep a discount would be. It was simply a mechanism that allowed customers to receive instantaneous discounts and that had the effect of ensuring that those customers who negotiated discounted prices received them.[5] Indeed, the chargeback system was used by generic drug manufacturers as well as BNPD manufacturers and was often the vehicle for getting discounts to retail pharmacies. The chargeback system neither prevented nor limited resale of

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[4] There were independent, non-contractual reasons why most recipients of discounted BNPDs could not resell them. The Prescription Drug Marketing Act forbids hospitals and other health care providers to resell to other sellers the prescription drugs that they purchase. *See* 21 U.S.C. § 353(c)(3)(A). In addition, the provisions in some contracts stating that the drugs are for the customer's "own use" are plainly responsive to this Court's decision in *Abbott Laboratories* v. *Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976), holding that a drug manufacturer can qualify for the "charitable institutions" exemption to the Robinson-Patman Act if it obtains an affidavit from the not-for-profit entity that the latter is purchasing the drugs for its "own use." The critical point, however, is that there was *no* evidence that contractual restrictions on resale resulted from an agreement among manufacturers.

[5] So long as manufacturers independently negotiated prices with customers, it was "no more . . . illegal per se for the wholesalers to devise collectively a system by which each manufacturer could engage in discriminatory pricing while selling through wholesalers than it would be illegal per se for them to agree on a standard form for inventorying drugs or a common method of inspecting drugs to make sure they are safe." Pet. App. 4a.

discounted drugs by the customers that received discounts. Once a customer obtained a drug at a discounted price, the chargeback system did not speak to the future sale of the drug.

The restriction of price competition through control of the resale of discounted drugs was thus neither the purpose nor the effect of the chargeback system.[6] As the trial judge explained:

> Even Dr. Robert Lucas acknowledged that the use of a chargeback system is not "inherently anticompetitive" and admitted "there's nothing wrong with the chargeback system on its face." Dr. Lucas acknowledged that the Wholesalers utilize the chargeback system for all the products they distribute, including generic and over-the-counter drugs, and for which Class Plaintiffs level no allegations of conspiratorial conduct. Finally, in an admission crippling to the Class Plaintiffs' conspiracy theory, Dr. Lucas testified that it is in the Wholesalers' independent economic self-interest to utilize the chargeback system. [Pet. App. 47a.]

The sleight of hand petitioners are attempting is clumsy. There was no evidence of an agreement to *use* the chargeback system; indeed, discounts were often delivered to customers through rebates rather than the chargeback system. Petitioners' only evidence of agreement among drug manufacturers was their agreement on certain ministerial aspects of the chargeback system that would apply *if* a manufacturer were to use that system. But, that agreement is beside the point because, as described above, the chargeback system does not affect price competition and

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[6] Petitioners claim that they presented evidence that the chargeback system was jointly developed "for the specific purpose of preventing the re-sale of discounted drugs to retail pharmacies." Pet. 14 n.8. None of the citations remotely supports petitioners' claim. *See, e.g.*, A4020-21 (merely describing chargeback system as the product of joint action).

agreement on its procedural mechanisms does not violate section 1. Petitioners thus try to make it appear that the chargeback system *includes* restrictions on resale by customers receiving discounted prices.[7] But, the chargeback system does not restrict resale, and there is no evidence that respondents *entered into any joint agreement* to restrict the resale of discounted drugs.

In sum, the critical distinction between *Socony-Vacuum* and *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), and this case is that in those cases, this Court found that the defendants had entered into an agreement to restrict price competition while in this case, the lower courts held that no such agreement existed. Accordingly, there is no inconsistency between this Court's decisions and the decision of the court of appeals.

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[7] For instance, petitioners say that "many of the agreements that compromise the [chargeback] system and make it effective against re-sale are agreements that the manufacturers drafted and enforced." Pet. 14 n.8. But the chargeback system does not include such agreements, and petitioners' record citations provide no support for their statement. *See* A1062 (National Wholesale Druggists Association report describing problems that wholesalers have with the chargeback system; no reference to any agreement among BNPD manufacturers to prevent resale); A1156 (a McNeil Pharmaceutical memorandum describing difficulties applying the chargeback system to hospitals; no reference to use of the chargeback system to prevent resale); A2049 (Ciba-Geigy statement that it uses contracts to prevent resale of drugs sold at discounted prices; no reference to an agreement with other manufacturers to do so); A3863-64 (chargeback system prevents diversion by wholesalers); A4091-02 (same).

Petitioners also claim that the court of appeals "expressly found the specific purpose of the chargeback system to be 'preventing arbitrage'" and that the evidence on this point was so clear that it stated that the fact "'should have been stipulated.'" Pet. 13. What the court actually says is that "price discrimination should have been removed as an issue at trial by a stipulation of the parties." Pet. App. 8a. Moreover, the court explained that the chargeback system prevented "arbitrage" by *wholesalers*, not "arbitrage" or resale by purchasers receiving discounted prices. Petitioners have distorted the court of appeals' clear meaning.

II. THE COURT OF APPEALS CORRECTLY APPLIED THE TEST ESTABLISHED IN *DAUBERT* v. *MERRELL DOW PHARMACEUTICALS, INC.*

This Court recently explained that Federal Rule of Evidence 702 "grants the district judge the discretionary authority, reviewable for its abuse, to determine [the] reliability [of expert testimony] in light of the particular facts and circumstances of the particular case." *Kumho Tire Co.* v. *Carmichael*, 119 S. Ct. 1167, 1179 (1999). Here the retail pharmacies' expert, Dr. Robert Lucas, testified that "the demand [for BNPDs] by pharmacies [is] no less elastic than that by hospitals, HMO's, and nursing homes." Pet. App. 10a. If this were true, then a BNPD manufacturer's market power with respect to retail pharmacies would be identical to its market power with respect to these other entities, and it might be inferred that the higher prices paid by retail pharmacies were the product of collusion. The trial judge, however, concluded that Dr. Lucas's opinion was based on factual premises that were flatly contrary to the record evidence *presented by the retail pharmacies themselves* and that Dr. Lucas had failed either to consider the record evidence or to undertake a study of the material facts. Reviewing that decision for abuse of discretion, the court of appeals affirmed.

The lower court's decision is a plainly correct and legally unexceptional application of this Court's test for the admissibility of expert testimony, as articulated in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and elaborated in *Kumho Tire Co.* Particularly in light of the recent, detailed analysis and illustrative application of the *Daubert* test in *Kumho Tire Co.*, the issue plainly does not warrant review.

In *Daubert*, this Court held that trial judges must perform a gatekeeping function with respect to expert scientific testimony. The trial judge must "ensur[e] that an

expert's testimony both rests on a reliable foundation and is relevant to the task at hand." 509 U.S. at 597. Thereafter, in *Kumho Tire Co.*, the Court explained that the district court's basic "gatekeeping obligation" applies not only to scientific testimony, but to all expert testimony. 119 S. Ct. at 1174. And, the Court stated, in fulfilling its obligation, the trial court may consider any factors it reasonably believes affect the testimony's reliability. *Id.* at 1175-76. The Court concluded that the "trial judge must have considerable leeway in . . . determining whether particular expert testimony is reliable" and "must have the same kind of latitude in deciding *how* to test an expert's reliability . . . as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable." *Id.* at 1176. In so doing, the trial court should determine not whether a certain method or analysis by an expert is "generally" reasonable or reliable, but rather whether the method and analysis result in reliable testimony regarding "*the particular matter to which the expert testimony was directly relevant.*" *Id.* at 1177. "The trial court ha[s] to decide whether th[e] particular expert ha[s] sufficient specialized knowledge to assist the jurors 'in deciding the particular issues in the case.' " *Id.* at 1178.

In evaluating the reliability of Dr. Lucas's testimony, the trial judge concluded that Dr. Lucas's opinion that the demand of retail pharmacies for BNPDs was as elastic as that of hospitals, nursing homes, and managed care organizations was "not only not based on the evidence, [it was] inconsistent with it." Pet. App. 35a. Most pertinent here, the district court pointed out that Dr. Lucas based his opinion on the false premises that "[r]etail pharmacies had the same power to announce and enforce formularies [as] any hospital, nursing home, or mail-order house," that the "formularies maintained by hospitals and HMOs were not the reason Manufacturers gave discounts to those entities," and that "[r]etail pharmacies had the

same ability as hospitals to refuse to stock [BNPDs]." *Id.* at 36a. Each premise, the district court explained,

> is material to the validity of any opinions or conclusions that one may proffer about pricing in the pharmaceutical drug industry, yet Dr. Lucas was wrong in his beliefs about every one of them. . . . . [T]he falsity of Dr. Lucas' beliefs was established by the testimony of witnesses offered during the Class Plaintiffs' case in chief—evidence which was supposed to supply the foundation for his opinions. The knowledge, positions, and experiences of the Plaintiffs' witnesses foreclose any probity which could attach to Dr. Lucas' views. [*Id.* at 36a-37a.]

Finally, the district court explained that although Dr. Lucas had acknowledged that "different elasticities of demand can result in different prices charged to different customers for essentially the same goods and services," Dr. Lucas had "never made any study of demand elasticities of different types of customers of [BNPD] manufacturers, asserting their unimportance while confining his analysis only to the perceived demand elasticities of the ultimate patients." *Id.* at 37a. Dr. Lucas was unable to cite any study supporting his decision to use such a limit. T5541-42. The trial judge thought these omissions particularly significant because another of the retail pharmacies' experts had noted that "different types of managed care customers received different levels of discounts," strongly suggesting that BNPD manufacturers were engaged in differential pricing in response to elasticity of demand. Pet. App. 38a.

On review, the court of appeals affirmed the district court's exclusion of the portion of Dr. Lucas's testimony stating that "the demand [for BNPDs] by pharmacies [was] no less elastic than that by hospitals, HMO's, and nursing homes." Pet. App. 10a. The appeals court concluded this testimony was "properly excluded, or alternatively entitled to no weight, because it rested on a demon-

strated lack of knowledge about the competitive significance of formularies—the lists of approved or recommended drugs that hospitals, nursing homes, and HMO's and other managed care enterprises issue." *Id.* at 11a. Further, the court explained, Dr. Lucas's testimony that a retail pharmacy could issue a formulary was beside the point "because a pharmacy, unlike a hospital, nursing home, or other provider of medical care has no clout with doctors." *Id.* at 10a-11a.[8]

This analysis carefully follows this Court's instructions in *Daubert* and *Kumho Tire Co.* The lower courts were addressing not the general issue of whether Dr. Lucas's three-part test for collusion would, in fact, predict collusion accurately, if correct premises were utilized. Instead, the courts were addressing the specific issue of "using such an approach, along with [the expert's] particular method of analyzing the data . . . to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant.*" *Kumho Tire Co.*, 119 S. Ct. at 1177. See *id.* at 1178 ("district courts must 'scrutinize' whether the 'principles and methods' employed by an expert 'have been properly applied to the facts of the case' "). Accordingly, that opinion testimony was properly excluded as unreliable.[9]

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[8] Petitioners claim that record evidence supports Dr. Lucas's testimony that "any seller of drugs" could establish a formulary and that retail pharmacies had the same elasticity of demand as did managed care entities. Pet. 19, 20 n.11. In fact, the evidence was that retail pharmacies do not have the power to exclude BNPDs. *See supra* at 5. Dr. Lucas testified, "the marketplace which [a manufacturer] confronted was one where it was common for hospitals and HMOs to have formularies, but where no retailers had formularies." T5376-77.

[9] The lower court's decision is consistent with those of other courts of appeals that have applied the standard articulated in *Daubert* and *Kumho Tire Co.* to the testimony of economists. *See, e.g., Irvine* v. *Murad Skin Research Lab., Inc.*, 194 F.3d 313, 320 (1st. Cir.) ("[T]he basic premise of the expert's opinion to

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"[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 146 (1997). There is certainly no legal issue here that merits this Court's review.

III. THE RETAIL PHARMACIES FAILED TO PRESENT SUFFICIENT EVIDENCE OF COLLUSION TO AVOID A DIRECTED VERDICT.

Petitioners next ask this Court to grant certiorari to determine whether the retail pharmacies presented sufficient evidence of collusion to avoid a directed verdict. They implicitly acknowledge that the lower courts correctly articulated the test established by this Court. A review of the lower court opinions demonstrates that they also correctly evaluated the evidence before entering and affirming a directed verdict for defendants. This ruling does not merit further review.

A. There Was No Direct Evidence Of A Conspiracy To Deny Discounted Prices On BNPDs.

At trial, the retail pharmacies were unable to produce any direct evidence of a conspiracy to deny discounted prices on BNPDs and conceded that their case was "circumstantial." T4264. But in their petition, they have unsuccessfully attempted to come up with direct evidence.

First, petitioners argue that the testimony of Michael Dammert about an April 9, 1985 committee meeting of the NWDA is direct evidence of conspiracy. That asser-

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justify damages under Law 75 is flawed. Absent adequate factual data to support the expert's conclusions his testimony was unreliable" and properly excluded.), *cert. dismissed*, 120 S. Ct. 577 (1999); *Blue Dane Simmental Corp.* v. *American Simmental Ass'n*, 178 F.3d 1035, 1040-41 (8th Cir. 1999) ("[a]lthough Dr. Baquet utilized a method of analysis typical within his field, that method is not typically used to make statements regarding causation without considering all independent variables that could affect the conclusion" and his testimony was properly excluded).

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tion is wrong for many reasons. Initially, Mr. Dammert testified that *none of the manufacturer defendants and only one of the wholesaler defendants was even present* at the allegedy conspiratorial meeting of the wholesalers' trade association. Also plainly wrong is petitioners' argument that statements at the meeting should be attributed to defendants simply because they are members or associate members of the NWDA (a group which includes AT&T, General Electric, IBM, Polaroid, and many others). Pet. App. 6a; see also *Moore* v. *Boating Indus. Ass'ns*, 819 F.2d 693, 712 (7th Cir. 1987) ("membership in a trade association" is not enough to establish antitrust liability; " '[t]here must, instead, be some evidence of actual knowledge of, and participation in, an illegal scheme in order to establish a violation of the antitrust laws by a particular association member' "). Finally, while some of the non-defendant wholesalers at the meeting expressed a disinclination to grant retail pharmacies a discount in *wholesalers' service fees* (which are not the subject of any conspiracy allegation), such statements are not evidence of a conspiracy to deny retail pharmacies discounts on BNPD list prices. Pet. App. 6a.

Second, petitioners argue that the testimony of David Landsidle, a vice-president of Abbott Laboratories, provides direct evidence of a conspiracy. Pet. 21-22. Preliminarily, and contrary to petitioners' misleading description, there is no evidence that any respondents were present at the meeting in question. Rather, petitioners rely on the manufacturers' membership in the Pharmaceutical Manufacturers' Association. Again, such membership cannot form the basis of antitrust liability. See *supra*.

Moreover, the testimony about an October 1993 meeting is not evidence that respondents had reached an agreement in the mid-1980s not to discount prices to retail pharmacies. Mr. Landsidle's testimony described a meet-

ing of Washington lobbyists for drug manufacturers a month after the Clinton Administration proposed its healthcare reform bill, the Health Security Act of 1993. The proposed bill contained a "unitary pricing" provision which would have prevented any discounting of BNPDs. The lobbyists were discussing how hard to fight the unitary pricing provision, and whether the current discounting practices were *"politically* feasible" or "doable here in [Washington]," or whether they had to give in on this issue. MA2105-06 (emphasis supplied). It was in that context, Mr. Landsidle testified, that lobbyists discussed whether extant price discrimination was "appropriate" and concluded that "the prevailing view was that the current practice of having different prices was the appropriate practice." A2136. The discussions that Mr. Landsidle described thus concerned whether defending price discrimination in Washington was good politics. See A2134 ("[t]he consensus was that differential pricing was something that was supportable and our critics on Capitol Hill would probably criticize us for something else anyway"). Plainly, Mr. Landsidle's testimony related to petitioning activity, which is protected by the First Amendment, see *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), and, in any event, was not evidence of an agreement to deny discounts to retail pharmacies.[10]

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[10] The trial court excluded Mr. Landsidle's testimony on the ground that it described discussions that were "clearly political in nature," A36, and that its admission would have posed a serious risk of jury confusion and unfair prejudice. *See Weit* v. *Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457, 467 (7th Cir. 1981) (trial judges have broad authority to exclude evidence of political activity to avoid the risk that a jury will impose "antitrust liability for engaging in the First Amendment right to petition"). The court of appeals stated that it was error for the trial court to exclude Mr. Landsidle's testimony *in connection with the CPI claim*—that is, the claim that manufacturers conspired to peg increases in the list prices of BNPDs to the CPI, Pet.

Third, petitioners cite internal Ciba-Geigy memoranda expressing concern about retail pharmacies' buying groups and " 'doubt that the PMA [a manufacturers' trade association] will put forth a united front,' " and inquiring whether Ciba-Geigy "can do" anything about the situation. Pet. 23-24 (quoting A1094, 1095). The uncontradicted evidence was that Ciba never acted in response to the internal memorandum (written by a person with no pricing-related responsibility). The recipient of the memoranda did not consider the situation "dangerous." See T2271, 2273, 2276-77. Cf. *In re Baby Food Antitrust Litig.,* 166 F.3d 112, 125 (3d Cir. 1999) (actions by employees without pricing authority are not sufficient evidence to survive summary judgment). Equally to the point, the "concern" of the single employee was not communicated outside of Ciba, nor discussed at the PMA. See T2218-20 (district court ruling limiting the admissibility of the Ciba memorandum to the case against Ciba, a ruling not contested on appeal); T2271, 2273. As the court of appeals stated, "[a]ll firms worry about price cutting by their competitors; these worries are not evidence of price fixing." Pet. App. 7a (citing *Monsanto Co.* v. *Spray-Rite Serv. Corp.,* 465 U.S. 752, 763 (1984)).

B. Petitioners Failed To Present Evidence That Tends To Exclude The Possibility That The Drug Manufacturers Acted Independently.

In *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.,* 475 U.S. 574, 588 (1986), this Court explained that in section 1 cases where there is no direct proof of agreement, "antitrust law limits the range of permissible inferences from ambiguous evidence":

> [C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To sur-

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App. 14a, but implicitly concluded that the testimony was not evidence of an agreement to deny discounted prices to petitioners.

> vive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. [*Id.* (citations omitted).]

At the close of petitioners' case, their evidence had established that drug manufacturers engaged in price discrimination and "the basic independent rationale for why the defendants priced the way they did." Pet. App. 27a. The evidence showed that all health care providers—from physicians to retail druggists themselves, see *supra* at 4, responded to the ability of managed care to control access to patients by granting discounts for health care goods and services. Thus, when retail pharmacies were denied discounts, "the denials were based on the belief that retail pharmacies lacked the power to exclude the company's products, while others who received discounts were believed to have the power to exclude [BNPDs] through formularies and other prescribing-decision influences." *Id.* at 30a. See *supra* at 4-6. In short, it was in each BNPD manufacturer's individual interest to engage in price discrimination.[11]

Petitioners' first argument is that the lower courts' conclusion that BNPD manufacturers had market power is wrong because there was evidence that "respondents lacked sufficient market power to explain the pricing

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[11] Petitioners assert that the manufacturers must have been acting pursuant to an agreement because they sent letters using "almost identical language" denying discounts to retail pharmacies' buying groups. First, the language used in the cited letters is not almost identical. *See* A1640 ("at present, we do not have any special terms or conditions that would seem to match your request"); A1689 (our "policy precludes bidding"). Moreover, the letters responded to inquiries about volume discounts, A1684, A1689, and requests for bids on *generic* drugs, not BNPDs. A2043. One letter responded to a buying group that did not yet have members. A1145. Singly or together, they were not evidence of an agreement to deny discounts to retail pharmacies.

differentials." Pet. 24. It is telling that there is no citation following this sentence. But, petitioners say, defendants Ciba-Geigy, Forest, and Searle admitted in their opening statements that they lacked market power. Opening statements are not evidence, but, in any event, one searches the cited transcript pages in vain for any such admission. Counsel stated only that some of the BNPDs sold by these manufacturers faced competition. This is, of course, the BNPD manufacturers' point: With respect to some BNPDs, such as single-source drugs or drugs with high brand loyalty, they have market power (and do not discount), while with respect to others, they have a lesser amount of market power (and thus have sometimes offered discounts). This market-driven pricing structure was precisely what the evidence showed.

Next petitioners cite the opinions contained in a study by the National Economic Research Associates, a document that the trial court refused to admit into evidence, A4041-44, because its author was not properly qualified as an expert.[12] In any event, this study simply "found that many branded drugs have close therapeutic substitutes," Pet. App. 11a, and the court of appeals correctly held that, even so, BNPD manufacturers have market power with respect to some of their products:

> A consumer may rationally pay more for a trademarked product than for its physically identical substitute merely for the greater assurance of quality that a trademark conveys. And all that really matters is that physicians, for whatever reason, in writing prescriptions tend to write a brand name rather than the generic (chemical) name. It is this practice that forces pharmacies to carry a full line of brands and thus prevents them from credibly threatening a manufacturer with refusing to stock his brand unless

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12 While the court of appeals described this study as being in "[t]he record," Pet. App. 11a, it was not admitted and may not be considered in assessing the propriety of the directed verdict.

> he offers a discount. [*Id.* at 11a-12a (citations omitted).]

This conclusion is fully supported by the record evidence.

Next, petitioners assert that their "economic expert" prepared a regression analysis that "demonstrated that the amount of discounts given to favored customers bore no substantial relationship to the existence or degree of the manufacturers' market power," suggesting that market power is not the cause of price discrimination. Pet. 25. This sentence expands an argument confined to a footnote of petitioners' appellate brief (p. 65 n.48) and which neither lower court addressed, possibly because it mischaracterizes the evidence in a number of ways. First, the witness, Dr. Madansky, is a statistician, and not petitioners' "economic expert." Second, nowhere does Dr. Madansky use the phrase "market power." In fact, he testified only that there was little correlation between the amount of discount and the therapeutic category of a BNPD (*i.e.*, the type of medical condition for which the BNPD is used). A3905-06. Petitioners never presented any evidence relating therapeutic categories to market power.

Finally, petitioners contend that the lower courts made factual findings "concerning formularies and elasticities of demand for different buyers" that were "directly contradicted by evidence in the record." Pet. 26. There is no citation following this sentence, because there is no such contradictory record evidence.

IV. THE DIRECTED VERDICT IN THIS CASE IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *CONTINENTAL ORE CO.* v. *UNION CARBIDE & CARBON CORP.*

Petitioners' final argument is that this Court should grant certiorari to address the question whether the lower courts properly applied this Court's instruction in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370

U.S. 690 (1962), that evidence of a conspiracy to violate the antitrust laws should not be "tightly compartmentaliz[ed]" and that " 'the character and effect of *a conspiracy* . . . are to be judged . . . by looking at it as a whole.' " *Id.* at 699 (emphasis supplied).

In *Continental Ore,* the plaintiff had attempted to compete in the vanadium market on five occasions and had each time been thwarted. The plaintiff alleged a conspiracy to deny him entry, and this Court held that the lower court must consider the evidence pertaining to all five occasions of exclusion in determining whether an antitrust violation had occurred, rather than scrutinizing each exclusion separately. The critical point is that all of the facts related to an agreement to engage in the same anticompetitive conduct that had persisted over time.

Here, in marked contrast, petitioners allege that the lower courts erred by failing to consider evidence of an agreement to engage in one type of anticompetitive conduct in deciding whether a different group entered into an agreement to engage in a different type of anticompetitive conduct. Specifically, petitioners maintain that the lower courts were required to consider the evidence that BNPD manufacturers had conspired in the 1990s to peg to the CPI *list price increases to all customers* when deciding whether BNPD manufacturers and wholesalers had reached an agreement in the mid-1980s to deny *discounts off list prices to retail pharmacies.*

As this Court made clear in an analogous circumstance, *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), petitioners are wrong. In *Matsushita,* the court of appeals had held that "evidence of *other* combinations" was direct evidence of "a predatory pricing conspiracy." *Id.* at 595. This Court reversed, firmly rejecting the notion that an inference of agreement to engage in specified anticompetitive conduct arises from the evidence of an agreement to engage in different anticompetitive conduct:

> Evidence that petitioners conspired to raise prices in Japan provides little, if any, support for respondents' claims: a conspiracy to increase profits in one market does not show a conspiracy to sustain losses in another. Evidence that petitioners agreed to fix *minimum* prices (through the check-price agreements) for the American market actually works in petitioners' favor, because it suggests that petitioners were seeking to place a floor under prices rather than to lower them. The same is true of evidence that petitioners agreed to limit the number of distributors of their products in the American market—the so-called five-company rule. That practice may have facilitated a horizontal territorial allocation, but its natural effect would be to raise market prices rather than reduce them. *Evidence that tends to support any of these collateral conspiracies thus says little, if anything, about the existence of a conspiracy to charge below-market prices in the American market over a period of two decades.* [*Id.* at 595-96 (first emphasis in original; second emphasis supplied).]

Petitioners argue that there is a link between the two alleged agreements because the alleged ultimate result of each is that retail pharmacies will pay higher prices for BNPDs. Pet. 28-29. But increased prices are the anticipated result of any antitrust conspiracy, and *Matsushita* makes clear that more than just a common purpose ultimately to increase prices is necessary for a plaintiff to use evidence of one agreement as evidence of a different agreement. Petitioners simply ignore that BNPD manufacturers have independent business justifications for price discrimination; that the allegations pertain to different alleged conspirators, different pricing decisions, and different groups of victims; and that there is no logical link between the alleged conspiracies.

In this respect, as in all others, the court of appeals gave the evidence of conspiracy appropriate consideration under the standards established by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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